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WHAT CONSTITUTES DELIVERY TO A RAILROAD IN ORDER TO IMPOSE LIABILITY OF A COMMON CARRIER.

The question of delivery of goods to a railroad company was before the Court in a recent case in Connecticut, *Clara Turner Co. v. N. Y., N. H. & H. R. R. Co.*, 84 Atl., 298. The plaintiff was a theatrical company and had requested the defendant to set out a car to be loaded with the effects of the company for transportation from New London to Middletown, Connecticut. This the defendant had done and the plaintiff had loaded therein, on Saturday, all of the goods intended to be shipped in the car, with the exception of two ponies, which were to be put on board on Monday morning, one hour before the departure of the train. On Saturday night plaintiff told an employe of defendant, who was not its yard master, that everything was in the car, not intending, however, to be understood to mean that the ponies were in the car, and defendant's employe knew this. On Sunday the car was locked and moved by defendant to a point beside the platform, convenient for the loading of the ponies. The Trial Court found that on the previous Sunday the plaintiff had requested that the car be placed at that point for his convenience in unloading the ponies, and that on several previous visits of the plaintiff to New London the car had been placed at the same point for the

same purpose. The car had been moved this time without any request from the plaintiff, though it appeared that the defendant had done this in accordance with the custom on previous occasions and merely for the plaintiff's convenience. About twelve o'clock Sunday night the goods in the car were damaged by fire and such damage is the cause of this action.

The general rule applicable to this state of facts was very ably discussed in the case of *Boyd Burrowes v. Chicago, Burlington & Quincy Railway Co.*, 85 Neb., 497. It is a case of particular interest in this discussion, because of its recent date, 1909, and the almost exact similarity of its facts to those of the principal case. Plaintiff, who was a proprietor of a tent show, loaded a part of his outfit on Sunday afternoon into a car furnished him by defendant, and retained the remainder for his use during the following night, under an agreement with defendant's agent that plaintiff would finish loading the car on the following Monday morning. The car was destroyed by fire, without negligence on the part of the defendant, before Monday morning. Barnes, J., at page 501 of the report says: "The rule seems to be well settled that in order to render a transportation company liable as a common carrier for the loss of goods, delivery of the goods must be made to the carrier or his agent for transportation; for, if the goods are delivered to him to be stored by him for a certain time, or until the happening of a certain event, or until something further is done to prepare them for transportation, or until further orders are received from the owner, the carrier becomes a mere depositary, or bailee, until the appointed time has expired, or the other contingency happened upon which the carriage is to commence, or until further orders have been given, as the case may be; for nothing could be more unjust than to permit the owner of the goods to impose upon a mere depositary or warehouseman, whether he has yet become related to the goods as carrier or not, the extremely hazardous responsibility of the common carrier, so long as it might suit his interest or convenience to do so." The Court expressly states that the case of *Basnight v. Atlantic & N. C. R. Co.*, 111 N. C., 592, governs the case, and we also find it cited in support of the opinion in the principal case.

In the case of *Kansas City, M. & O. Ry. Co. v. Cox*, 25 Okl., 774, it was held that before delivery is complete the owner must not only have relinquished control over the car, but notice that it was ready for shipment must have been given the carrier. These

cases seem clearly to establish the rule that the liability of the common carrier as such attaches at the moment when the shipper makes known to him that the goods have been put entirely into his charge and that they are ready for immediate shipment. The fact of being ready for immediate shipment is the controlling factor in the matter and when, by acts, words, or reasonable inferences resulting from established custom, that fact is brought home to the knowledge of the carrier, or his agent, the liability of the common carrier begins. For further authorities upon this point, in addition to those cited in the principal case, see: *Merriam v. Hartford, etc., R. R. Co.*, 20 Conn., 354; *Central of Georgia R. R. Co. v. Sigma Lbr. Co.*, 170 Ala., 627; *Milne v. Chicago, R. I. & P. Ry. Co.*, 155 Mo. App., 465; *American Lead Pen. Co. v. Nashville, C. & St. L. Ry.*, 134 S. W., 613.

The question as to whether the carrier has, in a given case, voluntarily taken charge of the goods as a carrier is a question of fact for the jury, but a question that is to be determined in the light of established rules of conduct, so that men may know, in their daily transaction of business, what is required of them. It was claimed in the argument in the principal case that the defendant's act in moving the car on Sunday was a voluntary assumption of complete control over the goods and that therefore the liability of the common carrier had attached. Such is not the law. Delivering the judgment of the Court in *Judson v. Western Railroad Corporation*, 4 Allen (Mass.), 520, Merrick, J., says, after stating the general rule as to delivery: "But like all other general rules, it is subject to modifications resulting from the express stipulations of the parties, or from the usages of trade and business. And as it sometimes happens that a party is at once a warehouseman and a carrier, and that goods received by him are lost and destroyed before they are put *in itinere*, a very important question may in such case arise, whether the receiver is liable in the one or the other capacity; for his responsibility is not co-extensive in each of those relations; *Story on Bailments*, Sec. 535. This must always be a question of fact to be determined upon proof of the actual and surrounding circumstances, the material point of inquiry being whether the one or the other character predominated in the particular stage of the transaction when the disaster occurred." This language lays down a very simple and reasonable rule and one that, in most cases, should be easy to apply. Consider the receiver in the character of a ware-

houseman. He has received goods of the shipper, and in order to better accommodate his customer and the necessities of his business, makes use of his facilities for carriage to better handle the goods. In all cases of this, and a similar nature, the character of warehouseman predominates and the character of carrier is merely incidental to and in aid of it. On the other hand, if the goods have been received by the carrier for immediate transportation and his warehousing facilities are used only incidentally to and in aid of his character as carrier, then the liability of the common carrier at once attaches upon the receipt of the goods. Further authorities upon this point are: *Fitchburg & Worcester R. R. v. Hanna*, 6 Gray, 539, 66 Am. Dec., 427; *Story on Bailments*, Sec. 536; *Railway Co. v. Murphy*, 60 Ark., 333; *Ladue v. Griffith*, 25 N. Y., 364.

In the principal case the defendant used his facilities for carriage to receive some of the plaintiff's goods in one place and then moved the car to receive some other goods in another place, it appearing that this was done to better accommodate the plaintiff. Applying the rule as stated above to this state of facts, it is clear that the defendant was acting only in the character of warehouseman and cannot be held as a common carrier. The result is that both upon principle and authority we find the principal case to have been well decided for the defendant.

THE EFFECT OF CONDITIONAL RESERVATION OF RE-ENTRY IN AN ASSIGNMENT OF A LEASE.

Is an instrument purporting to be an assignment of a lessee's entire term, but reserving the right to receive the rent and to re-enter for condition broken, in effect a lease or an assignment?

This question came up for adjudication in the Supreme Court of Texas, on December 4, 1912, in the case of *Davis v. Vidal*, 151 S. W., 290, as a result of successive appeals by the plaintiff from judgments rendered against her. In 1907 the plaintiff leased the premises involved in the dispute to the Dallas Brewing Company, giving them the privilege of sub-letting. Thereafter the Brewing Company executed an instrument to the defendant whereby they "sub-let, assign and transfer", etc., the above premises and the above lease to the said Vidal, reserving, however, the right to pay the rent to the lessor, and reserving also in the event of the failure of the under tenant to pay the rent to the lessee